



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CRIMINAL APPEAL NO 186 & 187 OF 2011**

*(From judgment of J.O. MAGORI, SRM in Sirisia SRMCCRC NO 363 OF 2011)*

**DAVID CHESTIT KIMINY.....1<sup>ST</sup> APPELLANT**

**MOSES ARAMISI NGACH.....2<sup>ND</sup> APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

**The charges and conviction**

[1] The Appellants with others were charged with five counts. Count 3 & 5 were withdrawn. They pleaded guilty to and were convicted on Count 1; Burglary and stealing; Count 2; breaking into a building and committing a felony; and Count 4; stealing. Each Appellant was sentenced to serve 4 years imprisonment for count 1; 4 years imprisonment for count 2; and 2 years imprisonment for count 4. The sentences were to run concurrently. The Appellants were aggrieved by the conviction and sentence and filed appeals herein.

**The Two Appeals**

[2] The judgment herein relates to the two appeals namely **BGM HCCRA NO 186 OF 2011** and **BGM HCCRA NO 187 OF 2011** filed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, respectively. The two appeals were argued and the record of the Appellants' and Respondent's submissions is contained in **BGM HCCRA NO 186 OF 2011**. But the court in this judgment will make specific orders toward each appeal. For ease of reference, the court will tackle the merits of each appeal separately under the titles "**The Appeal by the 1<sup>st</sup> Appellant**" and "**The Appeal by the 2<sup>nd</sup> Appellant**".

**THE APPEAL BY THE 1<sup>ST</sup> APPELLANT**

[3] The 1<sup>st</sup> Appellant filed an appeal for retrial on the following grounds;

a) *That I pleaded guilty out of my conscious.*

b) *That the learned trial magistrate erred in law and facts by failing to appreciate*

*the failure of the prosecution witness to turn up in the dock on the very day of the trial contrary to section 202 of the penal code.*

*c) That the complainant as guaranteed under section 204 of the penal code had entered an application of case withdrawal which the trial magistrate failed to appreciate.*

*d) That I pray to be furnished with the prosecution statement to raise additional grounds.*

[4] The 1<sup>st</sup> Appellant correctly submitted that he only pleaded guilty to counts 1, 2 & 4 and that counts 3&5 were withdrawn. The typed proceedings of the record do not reflect the handwritten record of the trial magistrate in respect of the plea taken. The handwritten record shows that the Appellants pleaded guilty to counts 1, 2 & 4, and not guilty to counts 3&5 which were later withdrawn after which the Appellants were acquitted. That is the correct position of the record and I shall so proceed.

[5] The 1<sup>st</sup> Appellant's appeal is entitled APPEAL FOR RETRIAL. He has made substantive prayer for retrial. He has also prayed for the quashing of the conviction and sentence herein. In his oral submissions in court, the 1<sup>st</sup> Appellant pleaded with the court to forgive and help him. He did not make any further submissions on the grounds of appeal.

**Ground 1: That I pleaded guilty out of my conscious**

[6] True it is, he pleaded guilty to the charges in count 1, 2 & 4. In such a case, under section 348 of the CPC, the law is that he is entitled to appeal only on the legality or extent of sentence. He is not even claiming impropriety, incorrectness, irregularity or illegality of the proceeding, or the sentence. The plea was first taken on 30.6.2011 and the 1<sup>st</sup> Appellant pleaded guilty to all the five charges, but the case was adjourned to 4.7.2011 for the prosecution to render the statement of facts. On 4.7.2011, the charges were read again to the 1<sup>st</sup> Appellant and he pleaded guilty to only count 1, 2 & 4. Then the prosecution was called upon to render the facts on counts 1, 2 & 4, which they did with specific details. The 1<sup>st</sup> Appellant was again called upon to state whether he admits or disputes the facts. He replied the facts are true. The plea was, therefore, taken in accordance with the law as laid down in the famous case of **ADAN V R** and was unequivocal.

**Ground 2: That the learned trial magistrate erred in law and facts by failing to appreciate the failure of the prosecution witness to turn up in the dock on the very day of the trial contrary to section 202 of the penal code.**

[7] Since the 1<sup>st</sup> Appellant pleaded guilty, the claim that witnesses were not availed is misplaced, for there is no necessity in law that witness should be availed upon a plea of guilt. That ground fails flat.

**Ground 3: That the complainant as guaranteed under section 204 of the penal code had entered an application of case withdrawal which the trial magistrate failed to appreciate**

[8] From the record, it is count 3 & 5 which were withdrawn. They related to Stealing from a Locked Motor Vehicle, and Malicious Damage to Property contrary to section 279(g) and 339(I) of the Penal Code, respectively. Those offences are distinct from those in count 1, 2 & 4 for which he was convicted. The court recorded, appreciated the withdrawal application and determined it by allowing the withdrawal. Such withdrawal did not affect the other charges for which he was convicted and sentenced. The ground that the charges had been withdrawn is untenable in so far as counts 1, 2 & 3 are concerned.

**Ground 4: That I pray to be furnished with the prosecution statement to raise additional**

## grounds

[9] This ground is hinged to an order of retrial if it is ordered by the court. There are no circumstances which would impel the court to order a retrial. This is a pure case of an appeal falling under section 348 of the CPC. There is no basis for a retrial. The ground, therefore, fails.

[10] The offence under section 279(b) and 304(2) is punishable by fourteen years and ten years imprisonment, respective. That under section 275 is punishable by three years imprisonment. Looking at the sentences meted out they are reasonable. The sentences are also legal.

[11] For those reasons, the Appeal by the 1<sup>st</sup> Appellant is dismissed. I uphold the conviction and sentence imposed by the trial court.

## THE 2<sup>ND</sup> APPELLANT'S APPEAL

[12] The 2<sup>nd</sup> Appellant filed a Petition of Appeal and proposed the following grounds;

*a) That I suffered for my alibi defence whereby I was tortured and forced to thump print statements I did not know.*

*b) That, I pleaded guilty after vigorous torture in which I was threatened that I should do the same.*

*c) That, the trial magistrate ignored my mitigation facts.*

*d) That, I will adduce additional grounds concerning impugned of orders of the infringement and violation of my constitutional rights under section 7791) (2) of the laws of Kenya.*

[13] The 2<sup>nd</sup> Appellant put forward very terse oral submissions that he was arrested due to the friendship he had with the 1<sup>st</sup> Appellant who was his workmate. Although he claimed he did not commit the crime, he prayed for forgiveness. He did not submit on any of the grounds of appeal. But let me examine each ground.

### **Ground 1: That I suffered for my alibi defence whereby I was tortured and forced to thump print statements I did not know.**

[14] The ground entails very serious allegations of torture. The allegation, however, may not be proved in an appeal. From the record, there was no allegation at all of torture, except, some instances where the 2<sup>nd</sup> Appellant complained of chest pains. The other persons with whom the 2<sup>nd</sup> Appellant was charged also complained of illness one time or other and the case had to be adjourned. But that does not mean much in the appeal set-up. I am guided by the case of **Court of Appeal at Nairobi Criminal Appeal No 459 of 2007** when the court dismissed similar claim in an appeal and stated;

*This ground was not raised.....thereby denying the prosecution an opportunity to explain the alleged detention. In the circumstances, that even if there is any element of truth in the allegation, the appellant is deemed to have waived his rights when he failed to raise it as required. Quoted Julius KamauMbugua v R CACRA No. 50/08 which quoted Martin v Tauraga District court [1995] 2 LRC 788 - privy courts that " I see no reason to vindicate the right of one who allows the process to run into course without objection or complaint and then asserts the right at its conclusion."*

[15] The essence of the celebrated decision of the Court of Appeal in **JULIUS KAMAU MBUGUA V REPUBLIC CRIMINAL APPEAL NO 50/2008(UR)** was that, the remedy for infringement of constitutional rights of an Appellant lay in damages as the complaint was belated

and should not, therefore, be entertained in appeal. In the present case, this ground as a ground of appeal where the 2<sup>nd</sup> Appellant pleaded guilty and was accordingly sentenced is untenable. It fails.

**Ground 2: That, I pleaded guilty after vigorous torture in which I was threatened that I should do the same.**

[16] At this stage, it will be difficult to impeach the plea herein which was taken in accordance with the law. The plea was first taken on 30.6.2011 and the 1<sup>st</sup> Appellant pleaded guilty to all the five charges, but the case was adjourned to 4.7.2011 for the prosecution to render the statement of facts. On 4.7.2011, the charges were read again to the 1<sup>st</sup> Appellant and he pleaded guilty to only count 1, 2 & 4. Then the prosecution was called upon to render the facts on counts 1, 2 & 4, which they did with specific details. The 1<sup>st</sup> Appellant was again called upon to state whether he admits or disputes the facts. He replied the facts are true. The plea was, therefore, taken in accordance with the law as laid down in the famous case of **ADAN V R** and was unequivocal. As I said earlier, the claims of torture have not been supported by any evidence. This ground, thus, fail.

**Ground 3: That, the trial magistrate ignored my mitigation facts.**

[17] Mitigation is an essential aspect of sentencing and the trial court is enjoined in law to consider in the exercise of its discretion. His mitigation was that his mother ran away in 2008 and left him two siblings who depend on him. The court recorded that it has considered the mitigation before sentencing the 2<sup>nd</sup> Appellant. I observe that the offences under section 279(b) and 304(2) are punishable by fourteen years and ten years imprisonment, respective. That under section 275 is punishable by three years imprisonment. Looking at the sentences meted out they are reasonable in the circumstances of the 2<sup>nd</sup> Appellant. The sentences are also legal. The ground fails.

**Ground 4: That, I will adduce additional grounds concerning impugned of orders of the infringement and violation of my constitutional rights under section 7791) (2) of the laws of Kenya.**

[18] As I stated above, the Court of Appeal has held that such abuse or infringement of rights should be left for a claim for damages especially where it has been introduced too late in the day, and in particular at appeal level. The particular claim being proposed in this ground is better dealt with in a constitutional petition where appropriate relief will be granted. The appeal process is not appropriate at all, for the appellate court's power to take further evidence and the relief available are limited by law. In any event, there is no evidence which would even move the court to consider this allegation; nothing absolutely; it is just a mere allegation. The ground fails.

[19] For those reasons, I dismiss the appeal by the 2<sup>nd</sup> Appellant. I uphold the conviction and the sentence meted out.

**Dated, and signed at Bungoma this 18<sup>th</sup> day of October 2013**

**F. GIKONYO**

**JUDGE**

**Read, signed and delivered in open court at Bungoma this 23rd day of October 2013**

**H.A.OMONDI**

**JUDGE**